



29 July 2020

Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020

*Submission to the Education, Employment and
Small Business Committee*



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The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association established solely to serve councils and their needs. The LGAQ has been advising, supporting and representing local councils since 1896, allowing them to improve their operations and strengthen relationships with their communities. The LGAQ does this by connecting councils to people and places; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional and political excellence.

Executive Summary

The local government sector is a significant employer across Queensland. In many regional and rural areas, local government is one of the biggest, if not the biggest, employer in the community. Local governments are regarded as good employers with minimal, if any, allegations of wage theft as defined in the legislation levelled against them. Local Government does not object to the criminalisation of deliberate, wilful and systemic acts by unscrupulous employers to deny workers their lawful entitlements.

It is important however, the legislation criminalising “wage theft” and providing for an accessible, low cost and simple process for wage recovery is designed to target that minority of employers who fall within the unscrupulous category.

The legislation should not subject those employers who endeavour to do the right thing by their employees to unnecessary concerns about their obligations as an employer and uncertainty about any additional level of governance now affecting them. The legislation needs to be very clear and precise on who and what is subject to the new level of governance and risk of criminal prosecution.

The LGAQ makes the following recommendations:

Recommendation 1: *The LGAQ supports a legislative amendment to include a clear definition on the types of employee conditions/entitlements that an allegation of wage theft might encapsulate. This definition should cover entitlements or conditions that are stipulated by recognised industrial instruments and/or written contracts of employment.*

Recommendation 2: *The LGAQ recommends the Committee considers the inclusion in the legislation of detail on whom within a company structure could be personally held liable for wage theft and hence subject to criminal prosecution under the new legislation.*

Recommendation 3: *The LGAQ seeks certainty in the legislation that recovery claims /or prosecution as prescribed in the legislation only apply to wage theft occurring after the legislation has been enacted, with existing remedial provisions applying to any alleged theft occurring prior to the enactment of this legislation.*

Recommendation 4: *The LGAQ supports a legislative provision that exempts from prosecution an employer who has deliberately not paid an entitlement when of the genuinely-held belief the entitlement was not due to the employee.*

Recommendation 5: *The LGAQ recommends the Committee consider inclusion of a clause encouraging or mandating parties to exhaust local dispute-resolution remedies where*

appropriate prior to initiating proceedings under the industrial magistrate provisions provided for in this legislation.

1. Introduction

The LGAQ welcomes the opportunity to provide comment on *the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* that was introduced into the Queensland Parliament on 15 July and referred to the Education, Employment and Small Business Committee.

Local Government councils collectively engage more than 40,000 employees across Queensland. Councils range in size from employing in excess of 8000 employees down to councils with less than 40 employees. Councils' workforces are very diverse and cover roughly 245 different occupational groups.

From the outset, the LGAQ emphasises that it has no objections to the criminalisation of wage theft where that theft is caused by deliberate, wilful and systemic acts by unscrupulous and is generally supportive of any proposal to simplify processes for correcting wrongs. However, as is often the case with legislation, the devil is in the detail and it is the detail which this submission addresses.

It is also pertinent to note that local government, in its view, is still subject to a system of dated, over-complicated and confusing awards and award entitlements, which naturally leads to disputes over entitlements and appropriate employment conditions. The more confusing and complicated the award system is, the greater the risk of misinterpretation and mis-payment. This is particularly true for those smaller employers who simply lack the sophisticated and sustainable award interpretation capability to guarantee continual and consistent compliance.

2. Prosecution for unpaid wages

- (a) Part 2 of the Bill introduces the new crime of stealing the wages of an employee. As the explanatory note confirms, the changes to the criminal code do not provide for a definition of what constitutes an amount due to be paid to an employee and is designed to capture a broad range of payments and entitlements, with some examples outlined in the explanatory note. The LGAQ suggests there is a general principle that those who are to be governed by legislation have a right to know what they are exactly being governed on. It is further suggested that when it relates to legislation with penalties as significant as is being proposed by this legislation, there is added expectation that the extent of the coverage of the legislation would be readily apparent to those who might be at risk of offending and hence subject to those penalties.

While it is accepted courts will naturally look to explanatory notes when matters of dispute on application of legislation arise, employers will generally look to the legislation itself to determine their obligations and deploy resources to meet their compliance requirements.

Accordingly, the LGAQ would request the legislation be amended to include a clear definition on the types of payment withheld from an employee that is targeted by this legislation to remove any uncertainty or doubt for employers and employees. It is further contended that any payments alleged by an employee to have been stolen by an employer should be limited to entitlements, other than those of unpaid hours, prescribed in relevant industrial instruments and any written contractual arrangements between the employer and employee.

- (b) The legislation allows for criminal prosecution of an organisation or an individual employer for the offence of stealing from an employee. In civil prosecutions, some individuals may be protected against personal liability through vicarious liability provisions relating to their employment. Such would not apply in criminal matters.

In the case of local government, it begs the question of who within a council might be held personally culpable and subject to possible criminal prosecution in the event that an employee has been found to have had wages stolen by the employer. While a reference was made to a Director or other contributing person by the departmental briefing officers in the public hearing before the committee, the LGAQ seeks more certainty on personal culpability for council employers.

It also poses the question, in the event a single officer e.g. a CEO or HR director of an organisation is held to be liable, whether the risk of prosecution only apply to those who occupied the roles at the time of the offense or also extend to those holding the role at the time of the prosecution.

A point of clarification is also requested in that the LGAQ understands the new provisions are only to apply for claims made after the legislation is enacted. It is assumed from this that the actual wage theft has to have had occurred subsequent to the enactment of the legislation and would not include a claim lodged after the enactment but for “wages stolen” prior to the criminalisation legislation.

While it is easy to draw an opinion or view on these matters, it is the LGAQ’s contention that avoidance of doubt warrants amendments to the legislation to clearly stipulate where culpability lies and whether past offences are captured by the provisions.

- (c) The LGAQ appreciates that the prosecution of an individual or organisation would only proceed where there is threshold evidence of there being a deliberate and wilful action on the part of an employer to withhold entitlements from an employee. Concerns have been raised about situations where an employee (or their union on behalf of an employee) and the employer might have different views on an entitlement of an employee e.g.
- what award might apply;
 - what the appropriate classification for the employee is;
 - how to interpret an award or agreement provision.

Currently, Queensland awards and agreements provide for dispute mechanisms for dealing with disputes over industrial instrument interpretations with referral to the Queensland Industrial Relations Commission (QIRC) for final determination. This has proven to be an effective mechanism for dealing with these disputes.

While acknowledging that the courts would no doubt take into consideration the intentions of the employer when adjudicating over wage theft allegations, there remains a concern that a prosecution against an employer might proceed where an employer has deliberately withheld payments from an employee but on the genuine belief the employee was not entitled to the payments claimed. It is suggested the legislation would benefit from a recognition that genuine disputes on entitlements should not lead to criminal prosecution, regardless of the ultimate finding of a Commission on payment entitlement.

3. Recovery of moneys process

The LGAQ supports any process that provides for simple, quick and low-cost dispute resolution. However, it is equally imperative that a party’s right to research, prepare and present their case is not compromised by the state’s desire for an expeditious and inexpensive

resolution of a wage recovery claim. Due process must be able to run its course. The LGAQ has confidence in the judicial professionalism of the magistrates' court system and will view with interest the processes adopted by the courts to progress wage recovery matters brought before them.

An area of concern relates to the risk of admissions, concessions and statements made in conciliation conferences in a wages recovery process being used against them in any related but subsequent criminal prosecution matter. While the courts are aware of the different evidentiary requirements for criminal and civil prosecutions, there is a risk the elevated threat of prosecution might cause parties in conciliation situations to be more cautious about making concessions and compromise for risk of how they might work against them in a different legal environment. This would be disingenuous to the purpose of the process.

Also, as indicated in (c) above, local government employees are covered by industrial instruments that provide comprehensive mechanisms for dealing with disputes over entitlements. It would be unfortunate if the new legislation was seen to encourage parties to consider another option as an alternative for settling disputes other than following the existing mechanisms. It is suggested a clause in the legislation supporting parties to exhaust local dispute-resolution remedies where appropriate prior to initiating proceedings under the industrial magistrate provisions provided for in this legislation amendment would encourage local resolution of disputes and minimise any additional draw on magistrate court resources..

Should you require further assistance in relation to this matter please do not hesitate to call Tony Goode, Workforce Executive, LGAQ on [REDACTED] [REDACTED] or via email at [REDACTED]